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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MILTON RUSSELL SCHEPP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Did the trial court err in overruling Petitioner's Motion for a Judgment of Acquittal at the conclusion of the Government's case and at the conclusion of all the evidence as to Counts I and III of the Indictment wherein Petitioner was charged with conspiracy to destroy, by means of an explosive, an automobile being used in an activity affecting interstate commerce, in violation of 18 U.S.C. §§371 and 844(i), and damaging an automobile being used in an activity affecting interstate commerce, in violation of 18 U.S.C. §§2 and 844(i), respectively, for the reason that the evidence introduced by the Government was insufficient to establish that the vehicle alleged to have been damaged was being used in an activity affecting interstate commerce?

II.

Did the trial court err in overruling the objections of Petitioner and in denying the requests of Petitioner that the jury be instructed to disregard the testimony, that the testimony be stricken and that a mistrial be declared when, during the cross-examination of Petitioner the court permitted the Government to inquire of Petitioner whether it was true that the brother-in-law of Petitioner left town in 1964 as a result of the murder of Richard Leisure and whether, at that time, the brother-in-law of Petitioner worked for Jimmy Michaels, Sr., for the reasons that the same inquiry was not relevant or material to any of the issues in the case and that the same inquiry was highly prejudicial as it was designed to establish the guilt of Petitioner, who was charged with conspiring with Jimmy Michaels, III, to bomb Richard Leisure's cousin, by showing that he associated with a person alleged to have committed a crime similar to the one for which Petitioner was on trial?

III.

Did the trial court err in overruling the objections of Petitioner to evidence of certain out-of-court statements of alleged coconspirators of Petitioner for the reason that said statements were hearsay and were not admissible under Rule 801(d)(2)(E) of the Federal Rules of Evidence since the same statements were made after the object of the conspiracy had been accomplished and, thus, were not made during the course of and in furtherance of the conspiracy?

IV

Did the trial court commit plain error when it permitted the Government, during its closing argument:

A.

To characterize Petitioner as a "hoodlum" and a "criminal" for the reasons that the Petitioner had not placed his character in issue, that the characterizations were not supported by the evidence, and that the characterizations were highly inflammatory and prejudicial and deprived Petitioner of his right to a fair trial; and

B.

To make certain statements set out in full in the Statement Of The Case for the reasons that the statements were not supported by the evidence, the statements implied the existence of evidence in favor of the Government which had not been introduced and the making of the statements constituted prosecutorial misconduct which deprived Petitioner of his right to a fair trial?

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OPINIONS DELIVERED IN COURTS BELOW

The only opinion delivered by a court below in the instant matter is the opinion of the United States Court of Appeals for the Eighth Circuit filed October 11, 1984, in the cause of action styled *United States of America v. Milton Russell Schepp,* Cause No. 83-2244. The same opinion has not been published.

JURISDICTIONAL STATEMENT

On October 11, 1984, the United States Court of Appeals for the Eighth Circuit filed its opinion affirming the judgment of the United States District Court for the Eastern District of Missouri in the instant matter.

On November 8, 1984, the United States Court of Appeals for the Eighth Circuit denied Petitioner's Motions for Rehearing and for Rehearing En Banc.

No order has been obtained granting an extension of time within which to petition for certiorari.

The statutory provision which confers on this Court review by writ of certiorari the judgment of the United States Court of Appeals for the Eighth Circuit in the instant matter is 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions, statutes and rules are involved in the instant matter:

The first clause of the Sixth Amendment to the United States Constitution, which reads:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law..."

18 U.S.C. §844(i), which reads:

> (i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000.00, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000.00, or both; and if death results shall also be subject to imprisonment for any term of

> years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

Rule 611(b) of the Federal Rules of Evidence, which reads:

> Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

Rule 801(d)(2)(E) of the Federal Rules of Evidence, which reads:

> "A statement is not hearsay if...[t]he statement is offered against a party and is...a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

STATEMENT OF THE CASE

The instant cause of action was tried before a jury on an Indictment containing three Counts filed in the United States District Court for the Eastern District of Missouri, Eastern Division. The first Count of the Indictment charged that, between September of 1980 and August 12, 1981, Petitioner and James Anthony Michaels, III, together with others known and unknown, conspired to destroy, by means of an explosive, an automobile being used by John Paul Leisure in the business of Local 42 of the Laborers International Union of North America, an activity affecting interstate commerce, in violation of Section 371 and 844(i) of Title 18 of the United States Code. The second Count of the Indictment charged that Petitioner and James Anthony Michaels, III, made a destructive device without filing the proper form with the Secretary of the Treasury, in violation of Section 5822 of Title 26 of the United States Code. The third Count charged that, on August 11, 1981, Petitioner and James Anthony Michaels, III, damaged an automobile being used by John Paul Leisure in the business of

Local 42 of the Laborers International Union of North America, an activity affecting interstate commerce, in violation of Sections 2 and 844(i), Title 18, United States Code. The Jury found Petitioner guilty on each Count. Petitioner was sentenced to terms of imprisonment of five (5) years on Count I, of ten (10) years on Count II and of ten (10) years on Count III, said sentences to run concurrently.

Jurisdiction of the District Court was invoked by the Government under Sections 2, 371 and 844 of Title 18 of the United States Code and Sections 582, 5861(f) and 5871 of Title 26 of the United States Code.

The evidence at trial material to the questions presented was as follows.

EVIDENCE MATERIAL TO QUESTION I

On August 11, 1981, Paul Leisure was injured (T.1-40) when a bomb exploded (T.3-120) in his automobile (T.2-36,37), which was parked (T.1-34) on the street in front of his home (T.2-37) in St. Louis, Missouri. The only evidence adduced by the Government to establish that Leisure's automobile was being used in an activity affecting interstate commerce was the testimony of Irene Jones. According to the same testimony, Leisure is a field organizer in St. Louis, Missouri, for Local 42 of the Laborers International Union. Among the duties of a Field Organizer are the solicitation of new members and the collection of initiation fees and dues from members at job sites. Leisure receives an expense allowance of Two Hundred Dollars ($200.00) per month for the use of his automobile. No documentary evidence was produced showing Leisure to be employed by Local 42. Irene Jones, an employee of Local 42, mails various records, reports and checks of Local 42 to the International Union in Washington, D.C. (T.2-45).

After the bombing, a briefcase was found on the ground near Leisure's car. (T.2-22). The briefcase contained membership

application forms for Local 42, dues check-off forms and a booklet outlining the contracts between Laborers Union Locals and various industries. (T.2-22-24,2-45-46).

EVIDENCE MATERIAL TO QUESTION II

In April of 1981, William Albright, a friend of Jimmy Michaels, III, upon the request of Michaels, III, rented an apartment for Michaels, III. (T.2-99,113-118).

The Government sought to establish that the apartment rented by Albright for Michaels, III, was used to manufacture the bomb which damaged the Leisure automobile. (T.3-7,8,12,14,17-23,29,54-58,66,118,145-148). A fingerprint of Michaels, III, was found inside of the apartment (T.3-140), and fingerprints of Michaels, III, and Petitioner were found on magazines recovered from a trash bag containing mail addressed to the Michaels apartment (T.3-146-148). Automobiles registered to Petitioner (T.2-73,104), Robert D. Peters (T.2-95,3-113), John Michaels, the brother of Michaels, III, (T.1-20,2-77) and a relative of Jack Issa who allowed Jack Issa to use his automobile (T.3-3) were seen at various times in the parking lot of the apartment complex in which was located the apartment rented by Michaels, III.

The bomb which damaged the Leisure automobile was remotely activated (T.3-120). On the morning of August 11, 1981, one street over from the site of the Leisure incident, a resident noticed two men sitting in a car in front of his house. (T.2-52,57). The men were identified as Jack Issa and George Faheen, a cousin of Jimmy Michaels, III. (T.2-43). Norm Stiebel was called as a witness by the Government and testified that he purchased two cars for Petitioner (T.3-72-85) - the car in which the two men identified as Issa and Faheen were seen sitting (T.2-52,57) and a car which was later found by the FBI in a storage garage which had been rented for John Michaels by William Albright (T.3-114). Additionally, both cars were seen in the parking lot of the apartment rented by Michaels, III. (T.2-72,75,77,87,89).

Petitioner testified at his trial. During direct examination, he testified as to his relationship, if any, with each of the individuals the Government had sought to establish were involved in the bombing of Leisure's automobile. Petitioner testified that his first wife was Mary Peters. He was married to her in 1959 and they were divorced in 1968. (T.4-38). The couple had two children with whom Petitioner has remained very close. (T.4-16,38). Norm Peters, George Peters, Ollie Peters and Bob Peters are brothers of Mary Peters. Petitioner last saw Norm Peters in 1964 and last saw George and Ollie Peters approximately fifteen years ago at his daughter's First Communion. (T.4-31,32). Petitioner maintained some contact with Bob Peters after his divorce from Mary and had gone with him to the apartment at 2706 Arnold Tenbrook on three or four occasions during the summer of 1981 to watch a ballgame on television. (T.4-33,25).

The Peters family is friends with the Michaels family (T.4-50), but Petitioner had never seen Jimmy Michaels, Sr., Jimmy Michaels, Jr. nor Michaels, III, socially. He did know of them through his police work. He had never talked to Michaels, III, until he met him while confined with him after they both had surrendered in the instant matter. (T.4-27,28,29). Petitioner knows of John Michaels through the publicity surrounding the Leisure incident. (T.4-31).

Petitioner saw George Faheen, a cousin of Jimmy Michaels, III, one time in the early sixties at the home of Mary Peters' parents. (T.4-30). Petitioner knew of Jack Issa through his former brother-in-law and last saw him in 1964. (T.4-30,31).

Petitioner met Norm Stiebel approximately fifteen years ago when he operated a service station on the beat covered by Petitioner while Petitioner was a patrolman. (T.4-34). When Petitioner became Chief of Police of the City of St. George, he retained Stiebel to maintain the police cars. (T.4-35). In the summer of 1981, Petitioner told Stiebel that he was not happy with his performance and warned him that he would take the work

elsewhere if Stiebel did not maintain the cars properly. (T.4-36,37). Petitioner denied that he had anything to do with Stiebel purchasing two cars in the summer of 1981 or that he had any conversations with Stiebel about any cars or the Leisure bombing. (T.4-35,36).

On cross-examination, the Government asked Petitioner why he could specifically remember that he had last seen Norman Peters and Jack Issa in 1964. Petitioner stated that he remembered because that was when Norman Peters left town. Then, over the objection of Petitioner, the Government was permitted to ask:

> "Isn't it true that your brother-in-law, Norman Peters, back in 1964, left town as the result of the murder of Richard Leisure?"

and

> "Isn't it true, that at that time, or shortly before that, your brother-in-law, Norman Peters, had worked on and off for Jimmy Michaels, Sr.?" (T.4-44-50, specifically T.4-49,50).

EVIDENCE MATERIAL TO QUESTION III

Petitioner objected to the admission of three statements, two by Jimmy Michaels, III, and one by John Michaels, on the ground that the same were hearsay and were not admissible under Rule 801(d)(2)(E) of the Federal Rules of Evidence since the statements were made after the object of the conspiracy had been accomplished and, thus, were not made during the course of and in furtherance of the conspiracy.

William Albright testified that on two separate occasions during the days immediately following the incident of August 11, 1981, William Albright told Michaels, III, that the FBI had asked him about the apartment Albright had rented for Michaels, III. (The dates of these conversations are not clear from the transcript, but the evidence indicates that law enforcement of-

ficials were not aware of the apartment until August 15, 1981, (T.2-81-2-84) and, thus, could not have talked to Albright about the apartment prior to that date.) According to Albright, Michaels, III, on the first occasion, responded that there was nothing to worry about, that no one was in the apartment, that it had been wiped clean, that he should keep his mouth shut and that they had been very, very fast. (T.2-123,124). On the second occasion, Albright testified that Michaels, III, told him that it was good that he had told the FBI that he did not know anything, that he should be quiet, that his sources in the City said they didn't have anything, that they were fishing, and that he should stay cool and not say anything if he had to appear before a grand jury. (T.2-125,126).

Albright also testified that, after August 11, 1981, and "more than likely" before August 27, 1981, he asked John Michaels what was happening with the storage garage that he had rented for John Michaels and that John Michaels replied that he didn't know, but would check into it. (T.2-126,127). The storage garage referred to was the storage garage in which the FBI found one of the cars which Norm Stiebel testified he bought for Petitioner and which had been seen at the apartment rented by Jimmy Michaels, III.

EVIDENCE MATERIAL TO QUESTION IV-A

During its closing argument, the Government made the following statements:

> "He acted like a criminal and that is exactly what he is." (T.5-22).
>
> "[E]very piece of testimony in this case, every piece of evidence, sooner or later, comes right back to him as a criminal..." (T.5-56).
>
> "All he had to do, ladies and gentlemen, was break the case, act like a policeman instead of a hoodlum..." (T.5-59).

Petitioner was employed as a police officer by St. Louis County, Missouri, from 1966 to 1974 (T.4-14) and was, and since 1976 had been, employed as such by the City of St. George, Missouri, on the day when Leisure's automobile was bombed (T.4-16,17,23).

EVIDENCE MATERIAL TO QUESTION IV-B

Three portions of the Government's closing argument were:

I

"Somebody on that corner, who was clean, got stopped, didn't have anything on them, could give the signal, and they could hit the remote control device, and they could blow him up."

"There were other people out there. Now, who were the other people?"

"Was it Jimmy Michaels? I am not sure.

"*Was it Russell Schepp? I can't tell you that for sure.*"

"Was it Bobby Peters? I can't tell you that."

"Or was it another individual, who we are not aware of, who was in on the conspiracy, that we don't know about? But there was somebody else over there." (T.5-17,18) (Emphasis supplied.)

II

"There's nothing in the instructions say I have to give you a motive. Was he paid for this? I don't know. He was gone twenty months, and his family lived and he lived. And as to money, *he was getting money from somewhere.* He walked away from a job, and how many people can do that for twenty months? ... *he may have been paid for it.*" (T.5-58) (Emphasis supplied.)

III

"And he (referring to John McCrady, a witness called by the Government) testified that Paul Leisure was a member of organized crime. He also testified that Jimmy Michaels, Sr. was involved in and a leader of *organized crime. That's what you are dealing with here." (T.5-49) (Emphasis supplied.)*

ARGUMENT

I

The Writ of Certiorari should be granted to decide an important question of federal law which has not been, but should be, settled by this Court, namely, the breadth of federal jurisdiction under 18 U.S.C. §844(i).

Count I of the Indictment charged Petitioner with conspiring to destroy, by means of an explosive, an automobile being used by John Paul Leisure in the business of Local 42 of the Laborers International Union of North America, an activity affecting interstate commerce, in violation of Section 844(i), Title 18, United States Code. Count III of the Indictment is the same as Count I except that it charges the substantive offense.

Section 844(i) reads, in part, as follows:

> "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned..."

The history of Section 844(i) indicates that it was intended to extend jurisdiction to cases involving "substantially all *business* property." H.R. Rep. No. 1549, 91st Congress, 2d Sess.(1970), reprinted in [1970] U.S. Code Cong. & Ad. News 4007, 4046 (Emphasis supplied). The Courts have recognized this history and have stated that jurisdiction will extend to cases involving property having a "de minimis" connection with interstate commerce. *United States v. Mennuti,* 487 F.Supp. 539, 544 (E.D.N.Y. 1980), aff'd 639 F.2d 107 (2nd Cir.1981). The Courts, however, have refused to rule that all property has sufficient contact with interstate commerce to invoke federal jurisdiction, *United States v. Mennuti, supra,* and require that the property damaged "bear some real relationship to commerce". *United States v. Monholland,* 607 F.2d 1311, 1315 (10th Cir. 1979).

Federal Courts are Courts of limited jurisdiction. In a case brought under Section 844(i), if the Government fails to prove that the property damaged was used in interstate commerce or in an activity affecting interstate commerce, the Court is without jurisdiction and must dismiss the case. *United States v. Monholland, supra* at 1316.

In the instant matter, the Government sought to establish that the Leisure automobile was used in an activity affecting interstate commerce by attempting to prove that Local 42 was engaged in interstate commerce and that Leisure used the automobile in his job as a field organizer for Local 42. To that end, the Government proved that Local 42 mails reports and checks to the International Union in Washington, D.C. Additionally, the Government established that Irene Jones, an employee of Local 42, knew Paul Leisure to be a field organizer for Local 42, that the duties of a field organizer include the solicitation of new members and the collection of initiation fees and dues from members at job sites, that Leisure was on the payroll of Local 42, that Leisure received an expense allowance of Two Hundred Dollars ($200.00) per month from Local 42 for the use of his automobile and that a briefcase containing Local 42 materials was found near his car after the incident of August 11, 1981.

The above proof fails to establish that the Leisure automobile allegedly damaged by Petitioner was used in an activity affecting interstate commerce. First, the Government did not prove that Local 42 was engaged in interstate commerce. It merely showed that Local 42 mailed reports and monies to the International Union.

Second, the Government did not prove that the particular automobile allegedly damaged by Petitioner was the one used by Leisure in his work for Local 42. The evidence showed that the automobile was owned by Leisure personally, not Local 42. There was no evidence that the automobile allowance received by Leisure from Local 42 was for the use of that particular

automobile. There was no evidence that this was the only auto owned by Leisure. There was no evidence that Leisure had ever driven this auto. There was no evidence that any business of Local 42 had ever been conducted in the auto. There was no evidence that the auto had ever been at any job site. There was no evidence that Leisure himself had ever been at any job site or had ever performed any of the duties of his job. The evidence was only that *among* the duties of a field organizer is the solicitation of members at job sites. There was no evidence of the amount of travel required of a field organizer. There was no evidence that Leisure was working at the time of this incident. In fact, the evidence showed the auto was parked in front of his home. (T.2-37). There was no evidence that the damaging of the automobile was in any way motivated by or connected with Leisure's position with Local 42. Finally, there was no evidence that this automobile had ever been driven interstate or carried anything which had traveled or would travel interstate.

Petitioner's conclusion that the Government failed to establish that the Leisure automobile was used in an activity affecting interstate commerce is supported by the decisions of the courts which have addressed the issue of the breadth of federal court jurisdiction under Section 844(i). Those decisions stand for the proposition that Section 844(i) jurisdiction extends to prosecutions involving commercial property even if that property has only a *de minimis* effect on interstate commerce, but that Section 844(i) jurisdiction does not extend to prosecutions involving private property.

The two reported decisions concerning private property are *United States v. Monholland, supra* and *United States v. Mennuti, supra. United States v. Monholland* presents the fact pattern most similar to the one in the instant case. There, the defendants were charged, under Section 844(i), with conspiracy to destroy by means of explosives a pick-up truck owned by a judge of the State of Oklahoma, the object of the conspiracy being to kill the judge. The Government sought to establish

jurisdiction of the case by proving, through the testimony of the judge, that the judge drove the truck to and from his home and the courthouses of his circuit upon the United States highway system and that the cases over which he presided involved parties and interests from other States. The Court held that the above facts did not establish that the truck was used in an activity affecting interstate commerce. The Court noted that the truck was used simply to transport the judge to and from his work. If the truck failed, the judge would use another means of transportation. The Court continued that, even assuming the judge's official duties affected commerce, the truck was immaterial to the performance of those duties, and thus, no relationship existed between the truck and interstate commerce.

A similar situation exists in the instant matter if the evidence is construed in the light most favorable to the Government. Even if we assume that Leisure actually performed the duties of a field organizer, that he, in fact, used the automobile allegedly damaged by Petitioner when driving to a job site, and that his job as a field organizer affects interstate commerce, still the Government failed to establish the relationship of the automobile to Leisure's job, for as, in *Monholland,* the automobile was simply used to transport Leisure to his place of work. His alleged travel to job sites is analagous to the judge's travel from one courthouse to another. As in *Monholland,* no official business was conducted in the automobile and the automobile was not necessary to the performance of his duties.

Indeed, the evidence in *Monholland* is stronger than in the case at bar for the reason that the judge testified and established that he, in fact, drove the truck which was to be destroyed to the courthouses and, in fact, performed the duties of his office. In the instant matter, the Government did not prove that Leisure had ever driven the damaged automobile or that he had performed any of the duties of a field organizer.

In *United States v. Mennuti,* the defendants were charged, under Section 844(i), with destroying two private residences by

means of explosives for the purpose of collecting the insurance proceeds. In order to establish that the residences affected interstate commerce, the Government proved that the residences had been built, financed, maintained and insured with materials which had traveled in interstate commerce and by companies which conducted business in interstate commerce. Additionally, the Government argued that the defendant who lived in one of the residences conducted an arson ring from the residence which affected interstate commerce. The Court, focusing on the private nature of the residences, held that the Government failed to establish that the residences affected interstate commerce and, thus, failed to establish jurisdiction under Section 844(i).

The decisions concerning prosecutions involving business or commercial property destroyed or damaged by explosives are: *United States v. Nashawaty,* 571 F.2d 71 (1st Cir. 1978) (paint company which painted materials shipped worldwide by its customer); *United States v. Barton,* 647 F.2d 224 (2nd Cir. 1981) (two buildings each housing illegal gambling clubs which sold food which had traveled in interstate commerce); *United States v. Giordano,* 693 F.2d 245 (2nd Cir. 1982) (a fictitious piano store which would have sold pianos, the parts of which had traveled interstate); *United States v. Grossman,* 608 F.2d 534 (4th Cir. 1979) (a backhoe held for sale in interstate commerce); *United States v. Corbo,* 555 F.2d 1279 (5th Cir. 1977) (bookstore selling books which had traveled in interstate commerce); *United States v. Sweet,* 548 F.2d 198 (7th Cir. 1977), *cert. denied* 430 U.S. 969, 97 S.Ct. 1653, 52 L.Ed.2d 361 (1977) (tavern containing stocks of liquor which had traveled interstate); *United States v. Keen,* 508 F.2d 986 (9th Cir. 1974) (commercial fishing boat the catch from which was shipped interstate); *United States v. Andrini,* 685 F.2d 1094 (9th Cir. 1982) (commercial office building being constructed with materials which had traveled interstate); and *United States v. Schwanke,* 598 F.2d 575 (10th Cir. 1979) (building housing cafe which sold food which had traveled interstate).

In each of the above cases, the Courts found jurisdiction under Section 844(i). The commercial or business nature of the properties involved cannot be doubted for in each case the Government proved not only that the real or personal property damaged was used in a business (a building housing a restaurant, for example) but also that the business had interstate contacts (the restaurant sold food which had been shipped interstate). Thus, the above decisions reflect the purpose of Congress in enacting Section 844(i), namely, to protect interstate commerce from interference and interruption, H.R. Rep. No. 1549, *supra* at 4013, and respect the intent of Congress that jurisdiction under Section 844(i) extend only to property having a relationship with interstate commerce, for, while Section 844(i) is broadly drawn, it does not reach "everybody and everything". *United States v. Monholland, supra* at 1316.

Petitioner notes for this Court's information, that the Petition For Certiorari of James A. Michaels, III, which raised this issue, among others, was denied. *United States v. Michaels,* 726 F.2d 1307 (8th Cir. 1984), *cert. denied* United States Supreme Court Cause No. 83178 (1984). Petitioner submits, however, that substantially different proof relating to the use of the Leisure automobile in an activity affecting interstate commerce was elicited in the *Michaels* case.

II.

The Writ of Certiorari should be granted for the reason that the decision of the United States Court of Appeals for the Eighth Circuit on the issue of whether the trial court erred in permitting the Government to inquire of Petitioner whether it was true that Petitioner's brother-in-law left town as a result of the murder of Richard Leisure and whether that same brother-in-law worked for Jimmy Michaels, Sr., is in conflict with decisions of the United States Court of Appeals for the Fifth Circuit in *United States v. Ochoa,* 609 F.2d 198 (5th Cir. 1980); *United States v. Labarbera,* 581 F.2d 107 (5th Cir. 1978); *United States*

v. Singleterry, 646 F.2d 1014 (5th Cir. 1981); and *United States v. Romo,* 669 F.2d 285 (5th Cir. 1982).

Rule 611(b) of the Federal Rules of Evidence limits cross-examination to "the subject matter of the direct examination and matters affecting the credibility of the witness." With regard to a defendant in a criminal case, it has been stated that:

> "cross-examination in response to statements of the defendant made on direct examination must either clarify the point raised or tend to directly impeach the defendant on that point." *United States v. Crawford,* 438 F.2d 441 (8th Cir. 1971).

It is a:

> "long-established rule that a defendant's guilt may not be proven by showing that he associates with unsavory characters. . . 'That one is married to, associates with, or in the company of a criminal does not support the inference that that person is a criminal or shares the criminal's guilty knowledge. . . ' [A]dmission of evidence of bad conduct of relatives or friends is error." *United States v. Singleterry,* 646 F.2d 1014, 1018 (5th Cir. 1981) (Citations omitted).

In *United States v. Ochoa,* 609 F.2d 198 (5th Cir. 1980), several persons were charged with distribution and conspiracy to distribute heroin. One of the defendants, Juanita Cavazos, took the stand and testified that she had lived with her brother, Manuel, that she had met a codefendant through her friend, Molly, and that she had nothing to do with the drug transactions which were the subject of the charges against her. Additionally, she presented the testimony of two witnesses who testified, in substance, that she was a good worker, a good mother, a nice lady, dependable and truthful.

On cross-examination, the Government was permitted to elicit from Cavazos the facts that her brother, Armando, her brother-in-law and Molly had been in trouble with the law for drugs.

The Court held that the cross-examination of Cavazos was improper and reversed her conviction. The Court stated that Cavazos had not opened herself to cross-examination regarding the offenses of any of those people, and that the questioning was not necessary to clarify any matter left unclear on her direct examination, but was a highly prejudicial attempt to taint the defendant's character by guilt by association. See also *United States v. Labarbera,* 581 F.2d 107 (5th Cir. 1978); *United States v. Singleterry,* 646 F.2d 1014 (5th Cir. 1981); *United States v. Romo,* 669 F.2d 285 (5th Cir. 1982).

When applied to the facts in the case at bar, the law stated above requires one to conclude that the Court below erred in permitting the cross-examination of which Petitioner complains. Petitioner did not open the door to such cross-examination about Norman Peters. Petitioner did not place his general character in issue. The only character evidence was the testimony of three witnesses called by Petitioner that Petitioner is truthful. The cross-examination concerning Peters in no way concerned Petitioner's truthfulness and was, thus, improper under Rule 404 of the Federal Rules of Evidence.

Petitioner did not place the conduct or character of Norman Peters in issue. He simply stated, by way of background information, that he was his brother-in-law and had last seen him in 1964. Neither the Indictment nor the Government's evidence indicated that Normal Peters had anything to do with the events which gave rise to the prosecution of Petitioner. Norman Peters and his activities are totally irrelevant to this case.

The cross-examination did not serve either of the recognized purposes of cross-examination. It did not clarify a point left unclear on direct examination as Petitioner stated unequivocally on direct examination that he had last seen Norman Peters in 1964. It did not tend to directly impeach Petitioner on the point that he had last seen Norman Peters in 1964. In fact, the question implies that the Government knew that Petitioner had not seen Norman Peters since 1964.

The cross-examination served only one purpose — to prejudice the jury by insinuating that Petitioner, like his brother-in-law before him, worked with a Michaels to murder a Leisure. The insinuation was strengthened by the Government's allegations that another Peters, Robert, was involved with Petitioner.

There can be no argument from the Government that this cross-examination did not prejudice Petitioner.

> "When, in the prosecution of a defendant, counsel for the government indulges in unfair and improper cross-examination, the only purpose of which is to degrade the defendant and to prejudice the jury against him, the government, upon appeal, will not ordinarily be heard to say that the methods which were used did not have the effect which they were obviously intended to have."

Crawford, supra at 445.

III.

The Writ of Certiorari should be granted for the reason that the decision of the United States Court of Appeals for the Eighth Circuit on the issue of whether certain out-of-court statements of alleged co-conspirators of Petitioner were admissible under Rule 801(d)(2)(E) of the Federal Rules of Evidence is in conflict with the decision of this Court in *Krulewitch v. United States,* 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949).

The trial court permitted two out-of-court statements by James A. Michaels, III, and one out-of-court statement by John Michaels to be introduced in evidence against Petitioner under Rule 801(d)(2)(E) of the Federal Rules of Evidence which provides that a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy is not hearsay. All three of the statements were made after August 11, 1981, the date on which Leisure's automobile was bombed.

A statement is made during the course of a conspiracy if made after the conspiracy comes into existence and before the objective of the conspiracy is accomplished. *Krulewitch v. United States,* 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949). A statement is in furtherance of the conspiracy if it advances the interests or the object of the conspiracy. *Harrington v. United States,* 267 F. 97 (8th Cir. 1920). Weinstein's Evidence (1975), p. 801-143. The "in furtherance" requirement should be construed in a manner to be protective of the defendant.

> "Narrative declarations should not be admitted as a matter of course and statements of confession should be carefully scrutinized. Since prejudice is likely, the harmless error rule should seldom be relied upon by the trial judge. Whether a particular statement tends to advance the objective of the conspiracy can only be determined by examination of the context in which it was made."

Weinstein's Evidence (1975), p.801-147.

The Government must prove by a preponderance of the evidence independent of the statements sought to be introduced that a conspiracy existed, that the defendant was a member of it and that the statement was made during the course and in furtherance of the conspiracy. *United States v. Bell,* 573 F.2d 1040, 1044 (8th Cir. 1978).

In *Krulewitch v. United States, supra,* the defendant and a co-conspirator were charged with transporting a woman on October 20, 1941, from New York to Florida for the purpose of prostitution. At the defendant's trial, the Government introduced evidence of a statement made six weeks after October 20, 1941, by the co-conspirator to the complaining witness outside the presence of the defendant. In the statement, the co-conspirator told the complaining witness not to talk, to be careful what she said and that it would be better for the complaining witness and the co-conspirator to take the blame. 93 L.Ed. at 793.

The Government recognized that the chief objective of the conspiracy - transportation of the woman from New York to Florida for prostitution purposes - had been accomplished before the statement was made. Notwithstanding the same, the Government argued that the statement should be admissible under the co-conspirator exception to the hearsay rule as a declaration made in furtherance of an alleged implied conspiracy aimed at preventing detection and punishment. 93 L.Ed. at 794. This Court rejected the Government's argument and held that the statement was not admissible.

Applying the proposition of law set forth in *Krulewitch, supra,* to the instant matter, requires one to conclude that the statements of Jimmy Michaels, III, and John Michaels made after August 11, 1981, were not admissible against Petitioner under Rule 801(d)(2)(E). The objective of the conspiracy alleged in the Indictment was the injury or death of John Paul Leisure. That was accomplished on August 11, 1981, and, thereupon, the conspiracy ended. Thus, statements made after that date could not have been made in furtherance of or during the course of the conspiracy. Moreover, since the declarations concerned prevention of the detection of the crime, they are exactly the type of statements this Court ruled do not fall within the co-conspirator's statement exception to the hearsay rule.

The admission of the statements of Michaels, III, made after August 11, 1981, prejudiced Petitioner because they inculpated Michaels, III, with and through whom Petitioner allegedly acted, because they implied the apartment had been used in connection with the incident of August 11, 1981, and because the statements that no one was in the apartment and that it had been wiped clean substantiated the Government's speculation that on August 17, 1981, the apartment was vacant and no evidence could be found in it because it had been cleaned. (T.3-123,3-128-3-131).

Petitioner was prejudiced by the admission of John Michaels's statement about checking on the garage since it

created the impression that John Michaels might be a conspirator and since that impression, together with the evidence that John Michaels' automobile was seen at the Arnold Tenbrook apartment complex, strengthened the Government's argument that only conspirators had been allowed at the apartment. (T.5-16).

IV

The Writ of Certiorari should be granted for the reason that decision of the United States Court of Appeals for the Eighth Circuit in the case at bar on the issue of alleged improprieties committed by the United States Attorney during closing argument is contrary to the decision of the United States Court of Appeals for the Sixth Circuit in *United States v. Barker,* 553 F.2d 1013 (6th Cir. 1977), the decisions of the United States Court of Appeals for the Fifth Circuit in *Hall v. United States,* 419 F.2d 582 (5th Cir. 1969) and in *United States v. Morris,* 568 F.2d 396, 401 (5th Cir. 1978), and the spirit of the decision of this Court in *Berger v. United States,* 295 U.S. 78, 55 S.Ct. 629, 78 L.Ed. 1314 (1935).

The purpose of closing argument is to permit each party to state to the jury the conclusions which that party feels are required by the evidence. Thus, the closing argument must be limited to comments supported by the evidence or reasonable inferences flowing therefrom. *United States v. Bigeleisen,* 625 F.2d 203, 209-210 (8th Cir. 1980). *United States v. Bledsoe,* 531 F.2d 888, 892 (8th Cir. 1976) The Government "may not say anything to the jury implying that evidence supporting his position exists, but was not introduced at trial." *United States v. Morris,* 568 F.2d 396, 401 (5th Cir. 1978).

The leading case on prosecutorial misconduct is *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 633, 78 L.Ed. 1314 (1935). In that case, the improprieties of the United States Attorney, in conducting cross-examinations and in closing argument, caused the defendant's conviction to be reversed. This Court stated:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

A.

Characterizations Of Petitioner As A "Hoodlum" And "Criminal"

Petitioner submits that the statements characterizing Petitioner as a "criminal" and "hoodlum" were improper for three reasons. First, the statements refer to the character of Petitioner and Petitioner had not placed his character in issue. In *United States v. Barker,* 553 F.2d 1013 (6th Cir. 1977), the Court of Appeals for the Sixth Circuit stated that:

"the prosecution may not rely upon the defendant's bad character to prove guilt unless the defense has sought to exculpate him by proof of good character." 553 F.2d at 1025.

In *Barker, supra,* the defendants were charged with armed bank robbery. They had not produced character evidence. The defense attorney argued:

> "that police had charged the defendants because they were 'undesirables to law enforcement agencies' and not because they were guilty of the offenses charged." 553 F.2d at 1025.

The United States Attorney remarked during rebuttal,

> " 'Now I submit to you that desirable people don't rob banks; undesirable people do rob banks, and they admit they're undesirable. Because they're undesirable doesn't mean they robbed this bank, but you should consider that also along with all this other evidence.' " 553 F.2d at 1025.

The Court of Appeals held that the Government's attorney had violated his responsibilities under *Berger* by relying upon references to the defendant's character to prove guilt when the defendants had not sought to prove their good character. 553 F.2d at 1025.

Second, there was no evidence to support the characterizations of Petitioner. Both "criminal" and "hoodlum" imply a prior course of illicit conduct. No evidence was introduced that Petitioner had ever engaged in any type of illegal conduct.

Third, the references to Petitioner as a "hoodlum" and "criminal" were improper because they were in violation of the duty of the United States Attorney "to refrain from improper methods calculated to produce a wrongful conviction." *Berger v. United States, supra* 295 U.S. at 88. *Hall v. United States,* 419 F.2d 582 (5th Cir. 1969) is on point. In that case, the United States Attorney described the defendant as a "hoodlum". *Hall, supra* at 585. There was no objection to the use of the term. The Court held that that characterization of the defendant, together with other remarks of the prosecutor, required reversal. The Court stated:

> "This type of shorthand characterization of an accused, not based on evidence, is especially likely to stick in the minds of the jury and influence its deliberations. Out of the usual welter of grey facts it starkly rises - succinct, pithy, colorful, and expressed in a sharp break with the decorum which the citizen expects from the representative of his government."

Hall, supra at 587.

That the use of such terms deprived Petitioner of a fair trial cannot be questioned since the outcome of the trial depended upon whether the jury believed Petitioner's testimony. When the Government characterized Petitioner as a hoodlum and a criminal, the Government told the jury that Petitioner was not worthy of belief.

B.

Statements Not Supported by Evidence

The portions of the Government's argument implying that Petitioner gave the signal when to detonate the bomb which damaged Leisure's car, that Petitioner was paid for his alleged involvement in the conspiracy charged and that organized crime was involved in the incident out of which the instant prosecution arose were improper for three reasons.

First, the arguments were not supported by the evidence. *United States v. Bigeleisen, supra* and *United States v. Bledsoe, supra,* each concern arguments of the Government not supported by the evidence. In *Bigeleisen,* the United States Attorney, in order to explain why the testimony of two Government witnesses differed as to the quantity of drugs which had been sold, stated that the Internal Revenue Service was looking at the witness who testified that a lesser quantity of drugs had been sold. There was no evidence that the Internal Revenue Service was investigating the witness. For that reason, the Court held the argument to be improper. In *Bledsoe,* the defendant

was charged with making a false statement when purchasing a firearm. The defense was that the defendant did not understand the question asked when she made the false statement. The Government argued that the defendant knew about guns because she had a parole officer and parole officers tell their clients to stay away from guns. Because there was no evidence that the defendant had a parole officer or had been told to stay away from guns, the Court held the argument improper.

In the instant matter, there was no evidence to support the Government's assertion that someone, especially Petitioner, stood on a corner near the site of the Leisure incident and gave a signal to anyone to activate a remote control device. Nor was there any evidence that Petitioner was receiving money from somewhere or that he was getting paid for his alleged involvement in the conspiracy charged. There was absolutely no evidence about Petitioner's financial status either in general or during the period while he was absent from St. Louis. Finally, there was no evidence that Jimmy Michaels, Sr., was a leader of organized crime or that the incident of August 11, 1981, was in any way connected with organized crime. The only mention of organized crime in the entire trial occurred when John McCrady testified that James Michaels, Sr., and Paul Leisure were both organized crime figures in St. Louis. There was no evidence that anyone allegedly involved in the incident of August 11, 1981, had anything to do with organized crime.

The second reason that the arguments were improper is that, by engaging in argument not supported by the evidence, the United States Attorney again violated his duty, to see "that justice shall be done." *Berger v. United States, supra* 295 U.S. at 88.

The argument first set forth above is improper for still another reason - it violated the rule that an attorney "may not say anything to the jury implying that evidence supporting his position exists, but was not introduced at trial." *United States v. Morris, supra.* By stating, "Was it Russell Schepp? I can't tell

you that for sure," when there was no evidence that Petitioner or anyone was on the corner, the Government insinuated that it had some, but not conclusive, evidence that Petitioner was the person on the corner who gave the signal to detonate the bomb on Leisure's automobile.

These arguments deprived Petitioner of a fair trial. When the Government could not establish how the two men sitting in the Chevrolet allegedly purchased by Petitioner could have seen Leisure to know when to detonate the bomb, the Government asserted that a person was out there who could see both Leisure and the two men in the Chevrolet and that that person gave the signal to detonate the bomb - all, of course, without a shred of evidence to support the assertion. When the Petitioner argued that he had no reason to be involved in the conspiracy charged, the Government suggests he was paid for his involvement although not one iota of evidence was introduced to support that assertion. When the Petitioner argued that his involvement in the conspiracy was a figment of the Government's imagination, that the proof was not there, the Government tells the jury to put the proof in perspective, that its dealing with organized crime.

Such argument by a United States Attorney should not be tolerated for, certainly, these blows were not only hard, but foul.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2244

United States of America,
Appellee,

v.

Milton Russell Schepp,
Appellant.

Appeal from the United
States District Court
for the Eastern District
of Missouri

Submitted: May 16, 1984

Filed: October 11, 1984

Before ROSS, BENNETT* and McMILLIAN, Circuit Judges.

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* The Honorable Marion T. Bennett, Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

McMILLIAN, Circuit Judge.

Milton Russell Schepp appeals from a final judgment entered in the District Court[1] for the Eastern District of Missouri upon a jury verdict finding him guilty of conspiracy to damage by means of an explosive a vehicle used in an activity affecting interstate commerce in violation of 18 U.S.C. §§ 2 and 844(i) (1976), making an unregistered explosive device in violation of 26 U.S.C. § 5822 (1976), and damaging by means of an explosive a vehicle used in an activity affecting interstate commerce in violation of 18 U.S.C. § 844(i) (1976). Appellant was sentenced to terms of five, ten and ten years of imprisonment, respectively, to run concurrently. For reversal appellant argues that the district court erred in (1) admitting evidence of flight, (2) permitting the government to ask leading questions of one of its witnesses, (3) failing to restrict the government's cross-examination of appellant, (4) admitting out-of-court statements of a coconspirator, and (5) failing to declare a mistrial *sua sponte* because of improper closing remarks by the government.[2] For the reasons discussed below, we affirm the judgment of the district court.

At trial the government established the following facts. On September 17, 1980, Jimmy Michaels, Sr., was killed when a bomb exploded in his car. His grandson, Jimmy Michaels, III, indicated to a friend, William Albright, and to a police officer that he intended to avenge his grandfather's death.

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[1] The Honorable John F. Nangle, Chief Judge, United States District Court for the Eastern District of Missouri.

[2] Appellant raised two additional points on appeal: (1) that the government failed to establish that the damaged vehicle was used in an activity affecting interstate commerce and (2) that the district court erred in admitting evidence seized from a trash dumpster, an apartment and a storage garage. We hold that *United States v. Michaels*, 726 F.2d 1307 (8th Cir. 1984), is controlling on these points and rule them against appellant.

In March 1981, appellant, then chief of police of the City of St. George, Missouri, asked Norman Steibel, owner of an auto repair shop, to purchase two inexpensive automobiles for him using fictitious names. Steibel purchased a Ford and a Chevrolet for which appellant paid him in cash. In April 1981, Albright rented an apartment for Michaels for six months in a sixteen-unit apartment complex in Arnold, Missouri, and in June 1981, Albright rented a storage garage in Fenton, Missouri, for Michaels. Michaels told Albright that Albright could not keep a key to the apartment because there would be people in and out of the apartment all the time.

During the spring and summer of 1981, the Ford and Chevrolet purchased for appellant, as well as a car with the personalized license plate "SCHEPP," were seen outside the rented apartment.

On the morning of August 11, 1981, Paul Leisure was seriously injured when a bomb exploded in his car in front of his house. A brief case, containing papers and documents from Local 42 of the Laborer's International Union for which Leisure worked as a field organizer, was found on the ground near the car. An investigation revealed that a remotely activated, high explosive bomb was used. The Chevrolet purchased for appellant was seen parked one block away from Leisure's house at the time of the explosion with two men inside, later identified as Jack Issa and George Faheen. The men kept their attention focused on the corner Fotomat booth, from where Leisure's house was visible. A remote control device had recently been purchased by a man driving a red Volkswagen, which was the type of car driven by Faheen.

An FBI investigation led to Albright, Steibel, the rented apartment, and the storage garage. On August 15, 1981, FBI agents searched, without a warrant, the trash dumpster shared by all tenants of the apartment complex and found in a plastic garbage bag materials used in the manufacture of a bomb. In

another plastic bag they found mail addressed to the apartment rented for Michaels and magazines bearing the fingerprints of appellant and Michaels. A warranted search of the apartment revealed that it had been wiped clean of fingerprints. However, one fingerprint belonging to Michaels was recovered. Agents searched the storage garage and found the Ford purchased by Steibel for appellant.

Albright informed Michaels that the FBI had questioned him concerning the apartment. Michaels told Albright not to worry because the apartment had been wiped clean and that he should not say anything if called before a grand jury. Steibel informed appellant that the FBI was questioning him about the two cars. Appellant told Steibel not to mention his name and that the Ford was in a garage. On August 17, 1981, one day after speaking to Steibel, appellant left St. Louis and went to California where he remained until March 1983 when he voluntarily surrendered to face the charges against him for the Leisure car bombing.

Appellant testified that he had gone to the rented apartment several times during the summer of 1981 with one of his ex-brothers-in-law, Robert Peters, to drink beer and watch baseball games. His ex-wife's family, the Peters, was close to the Michaels family. Appellant testified that he left St. Louis because he received a phone call telling him that the Leisures planned to take reprisals against everyone who had been in the rented apartment.

During cross-examination, the government was permitted, over objection, to ask whether appellant's ex-brother-in-law, Norman Peters, left town in 1964 as a result of the murder of Richard Leisure and whether Peters had worked as a bodyguard for Jimmy Michaels, Sr. In closing argument the government theorized that at the time of the bombing someone was positioned in the Fotomat booth to signal to the men in the Chevrolet when to activate the remote control device. The government

suggested that appellant's motive for involvement in the crimes charged may have been money. The government made mention of organized crime in St. Louis, referred to appellant as a criminal and argued that in leaving St. Louis appellant did not behave as a police officer but as a hoodlum.

Admission of Flight Evidence

Appellant argues that the district court erred in admitting evidence that he fled St. Louis following the bomb incident upon learning that the FBI questioned Steibel about the two cars purchased for appellant. Appellant argues that this evidence was irrelevant or too prejudicial to be admitted. We disagree.

It is well settled that flight of the accused subsequent to the commission of a crime is, in certain instances, a circumstance proper to be laid before the jury as having a tendency to prove guilt. *United States v. Peltier,* 585 F.2d 314, 322-24 (8th Cir. 1978), *cert. denied,* 440 U.S. 945 (1979). In *Peltier* we held that in assessing the probative value of flight evidence, the facts of each case must be scrutinized to determine the strength and validity of drawing the following four inferences: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. *Id.; see also United States v. Rossbach,* 701 F.2d 713, 719 (8th Cir. 1983); *United States v. Blue Thunder,* 604 F.2d 550, 556 (8th Cir.), *cert. denied,* 440 U.S. 902 (1979).

We hold that there are sufficient "evidentiary manifestations," *see United States v. Peltier,* 585 F.2d at 323, in the present case to support all four of the necessary inferences. Appellant fled soon after the commission of the crime and, according to the government's evidence, immediately upon learning that the FBI's investigation uncovered the link between the two cars purchased for him and the crimes. *Compare United*

States v. White, 488 F.2d 660, 662 (8th Cir. 1973) (instructing the jury that it may consider flight evidence in its determinatin of guilt held not appropriate where the defendant, unaware that he was being sought for the crime charged, fled from police attempting to arrest him five months after commission of crime). Appellant's own explanation for his flight, *i.e.,* fear of reprisal by the Leisure family, suggests that his decision to flee may have been prompted by consciousness of guilt, and hence actual guilt, of the crimes charged.

The degree to which the probative value of the flight evidence may have been outweighed by the danger of unfair prejudice, under Fed. R. Evid. 403, was a matter within the discretion of the district court. The district court did caution the jury against giving undue emphasis to the flight evidence. We find no abuse of discretion in the admission of evidence of appellant's flight.

Leading Questions

Appellant next argues that the district court erred in permitting the government to use leading questions during its direct examination of its key witness, Steibel. The record does not reveal a pattern of leading questions. Rather, three questions during a long examination were objected to. Rule 611(c), Fed. R. Evid., permits the district court to allow leading questions when necessary to develop testimony. The use of leading questions is a matter left to the discretion of the district court. *McClard v. United States,* 386 F.2d 495, 501 (8th Cir. 1967), *cert. denied sub nom. Ussery v. United States,* 393 U.S. 866 (1968). We find no abuse of discretion here.

Cross-Examination of Appellant

Appellant also claims reversible error in the district court's allowing the government to inquire of appellant on cross-examination whether his ex-brother-in-law, Norman Peters, had worked for Jimmy Michaels, Sr., and whether Peters left St. Louis in 1964 as result of the murder of Richard Leisure. Ap-

pellant argues that this was an improper attempt by the government to prejudice appellant in the eyes of the jury by showing that his acquaintances were men of bad character and involved in criminal activity similar to that for which appellant was charged.

On direct examination appellant testified about the nature of his relationship with Norman Peters and that he had last seen Norman Peters in 1964. Under Fed. R. Evid. 601(b), cross-examination is limited to the subject matter of direct examination and credibility, with discretion in the district court to permit inquiry into additional matters where that would aid in the development of the evidence. The permissible extent of cross-examination is a matter within the broad discretion of the district court. *United States v. Drake,* 542 F.2d 1020, 1022 (8th Cir. 1976), *cert. denied,* 429 U.S. 1050 (1977). We find no abuse of discretion in this instance.

Coconspirator's Statements

Appellant argues that the district court improperly admitted several out-of-court statements of Michaels because these statements were not made in furtherance of and during the course of the conspiracy as required by Fed. R. Evid. 801(d)(2)(E). The specific statements challenged are the statements to Albright and a police officer indicating Michaels' intention to retaliate against those responsible for his grandfather's death, the statement to Albright that people would be going in and out of the rented apartment, and the statement to Albright that the apartment had been wiped clean of fingerprints and not to say anything to a grand jury.

Fed. R. Evid. 801(d)(2)(E) provides that a statement is not hearsay if it is offered against a party and constitutes "a statement by a coconspirator of [the] party during the course and in furtherance of the conspiracy." For an out-of-court statement to be admissible against a defendant under this provision, the government must demonstrate by a preponderance of indepen-

dent evidence (1) that a conspiracy existed, (2) that the defendant and the declarant were members of the conspiracy, and (3) that the statement was made during the course and in furtherance of the conspiracy. *United States v. Bentley,* 706 F.2d 1498, 1506 (8th Cir. 1983), *cert. denied,* 104 S. Ct. 2397 (1984); *United States v. Bell,* 573 F.2d 1040, 1043-44 (8th Cir. 1978).

The third requirement for admissibility, in issue here, is afforded a broad construction, *United States v. Bentley,* 706 F.2d at 1506, and we conclude that it was satisfied in the present case with respect to the statement that people would be going in and out of the rented apartment. The question whether the other challenged statements were made "during the course" of the conspiracy is more difficult. *See* 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(d)(2)(E)[01] (1978 & Supp. 1984), for a discussion of admission of "pre-conspiracy" and "post-conspiracy" statements. Even assuming, however, that these statements were not made during the course and in furtherance of the conspiracy, we conclude that any error in their admission was harmless. *See United States v. Bentley,* 706 F.2d at 1506. The statements did not mention or in any way implicate appellant and there was overwhelming independent evidence of the existence of a conspiracy and Michaels' and appellant's participation therein. In the circumstances of this case, there is not a reasonable possibility that this evidence contributed to appellant's conviction and any error in its admission does not require reversal. *See id.; United States v. Moss,* 544 F.2d 954, 960 (8th Cir. 1976), *cert. denied,* 429 U.S. 1077 (1977).

Closing Argument

Appellant's final argument on appeal is that the district court erred in not declaring a mistrial because of improper and prejudicial closing remarks by the government. Appellant cites as grounds for reversal the government's hypothesis about a conspirator at the Fotomat booth, suggestion regarding appellant's motive for participation, mention of organized crime, reference

to appellant as a criminal and characterization of appellant's behavior as that of a hoodlum.

The district court has broad discretion in controlling closing argument, and absent a showing of abuse of that discretion, this court will not reverse. *United States v. Michaels,* 726 F.2d 1307, 1315 (8th Cir. 1984); *United States v. Auerbach,* 682 F.2d 735, 739 (8th Cir.), *cert. denied,* 459 U.S. 911 (1982); *United States v. Bohr,* 581 F.2d 1294, 1301 (8th Cir.), *cert. denied,* 439 U.S. 958 (1978). We believe that the first comment pointed to by appellant was fairly supported by the evidence or reasonable inferences flowing therefrom and that the second comment was invited by appellant's closing argument asking the jury to focus on the question of what reason appellant would have had to get involved in the crimes charged.

We are more troubled by the government's mention of organized crime and especially by the government's reference to appellant as a criminal and characterization of appellant's behavior as that of a hoodlum. Statements such as these have no place in a criminal trial. They are offensive and in no way condoned by this court. Had a request been made, it would have been proper for the district court to strike these remarks and promptly instruct the jury to disregard them. The question on appeal, however, is whether, when viewed in the context of the entire trial, these remarks were "so offensive as to deprive the defendant of a fair trial." *United States v. Bohr,* 581 F.2d at 1301. With this in mind we hold that the remarks of the government do not require reversal. *See United States v. Michaels,* 726 F.2d at 1316; *United States v. Splain,* 545 F.2d 1131, 1135 (8th Cir. 1976).

Accordingly, we affirm the judgment of the district court.

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ATTEST:

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2244-EM. September Term, 1984

United States of America,
Appellee,

vs.

Milton Russell Schepp,
Appellant.

Appeal from the United States
District Court for the
Eastern District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

November 8, 1984